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IN THE

Supreme Court of the United States

October Term, 1947

No. .....

TRANS-PACIFIC CORPORATION, a Corporation; NUEBART STAMPING AND MANUFACTURING COMPANY, a Corporation; COMMUNICATIONS EQUIPMENT CORPORATION, a Corporation, and COLUMBIA STAMPING AND MANUFACTURING CORPORATION, a Corporation,

Petitioners,

vs.

GEORGE T. GOGGIN, Trustee in Bankruptcy.

Petition for Certiorari to the Circuit Court of Appeals for the Ninth Circuit.

Your petitioners, Trans-Pacific Corporation, a Corporation; Neubart Stamping and Manufacturing Company, a Corporation; Communications Equipment Corporation, a Corporation, and Columbia Stamping and Manufacturing Corporation, a Corporation, respectfully petition for certiorari in the Supreme Court of the United States to review the decision and judgment of the Circuit Court of Appeals for the Ninth Circuit affirming the judgment of the District Court of the United States for the Southern District of California, Central Division, and the Referee in Bankruptcy, and in respect thereto allege as follows:

Jurisdiction.

Jurisdiction is conferred by Title 28, Section 347, United States Codes, and by Title 11, Section 47, United States Codes.

The District Court of the United States for the Southern District of California, Central Division, affirmed the decision of the Referee on June 2, 1947 [R. 145]. The Circuit Court of Appeals affirmed the judgment of the District Court on March 25, 1948 [R. 166]. Petition for rehearing was filed within the time allowed by law and was denied April 28, 1948 [R. 178]. Petition for certiorari is being filed in May, 1948, within the time allowed by law.

Opinions Below.

The District Court affirmed the Referee in a memorandum opinion, which is found on page 137 of the record. The Circuit Court of Appeals affirmed without opinion [R. 166]. Also 166 F. (2d) 1021 and 76 Fed. Supp. 623.

Statutes Involved.

Sections 39, 58, 59(g), 312(2), 322, 334, 335, 336, 376(2) of the Bankruptcy Act.

Title 11, United States Code Annotated, Section 42.

Seventh Amendment to the Constitution of the United States.

The provisions of the foregoing sections and the Seventh Amendment are set out in the appendix hereto.

Short Statement of the Facts.

The four corporate petitioners herein, whose stock was in turn owned by one individual, found themselves confronted by a tax burden for excess profits of approximately $950,000.00 on October 28, 1946 [R. 3]. Aside from such tax burdens, the petition in bankruptcy of each of the corporations showed substantial assets. The petitioner corporations allege that the operating corporations can operate under their contract at a substantial profit and that the difficulties arose by reason of the tax obligations to the Government.

After the petitioners had filed their applications to be permitted to file a plan of arrangement under Chapter XI of the Bankruptcy Act, a notice was sent out by the Referee on October 29, 1946, only to the creditors of Trans-Pacific Corporation, a debtor, and not to the creditors of the other corporations. Said notice was set out as follows [R. 169]:

> "In the District Court of the United States, Southern District of California, Central Division. In Bankruptcy No. 44,604-BH. In the Matter of Trans-Pacific Corporation, a corporation, Debtor.
>
> NOTICE OF MEETING OF CREDITORS IN PROCEEDINGS UNDER CHAPTER XI, SECTION 322 OF THE BANKRUPTCY ACT; OF TIME FOR FILING APPLICATION TO CONFIRM ARRANGEMENT, AND HEARING ON CONFIRMATION AND OBJECTIONS THERETO.
>
> To the Creditors of Trans-Pacific Corporation, a corporation, Debtor, of 1026 Pacific Mutual Building, 523 West 6th Street, Los Angeles, California, and District aforesaid:

Notice is Hereby Given that on the 29th day of October, 1946, Trans-Pacific Corporation, a corporation, filed a petition in this Court proposing an arrangement with its creditors under the provisions of Chapter XI, Section 22, of the Acts of Congress relating to Bankruptcy, and that a meeting of its creditors will be held in the courtroom of the undersigned Referee, 339 Federal Building, Temple and Spring Streets, Los Angeles, California, on the 19th day of November 1946, at 10:00 a. m., at which time and place the said creditors may attend, prove their claims, nominate a trustee, appoint a committee of creditors, examine the debtor, present written acceptances of the proposed arrangement, and transact such other business as may properly come before said meeting.

Notice is Further Given that the application to confirm said arrangement shall be filed with this court on or before the 19th day of December, 1946; and that the hearing on the confirmation thereof, or objections thereto, if any, shall be and is hereby set for the 19th day of December, 1946, at 10:00 a. m. at the above address.

Notice is Further Given that on December 19, 1946, at 10:00 a. m., should the creditors not consent to the proposed Plan of Arrangement, or should the Court not confirm the said Plan, the Court will, under the provisions of Section 376(2) of Chapter XI determine whether the proceedings should be dismissed or an order of adjudication be made herein, whichever may be in the best interest of creditors.

Notice Is Further Given that only creditors having claims on file may vote for the appointment of a trustee or creditors' committee and for confirmation or rejection of the proposed arrangement.

A summary of the liabilities, as shown by the schedules, is as follows:

Taxes due United States	$62,983.05
Taxes due States	7,470.00
Taxes due counties, etc.	162.17
Unsecured claims	21,687.46
Total Liabilities	$92,302.68

A summary of the assets, as shown by the schedules, is as follows:

Cash on hand	$ 45.00
Negotiable and non-negotiable instruments and securities	Uncertain
Debts due in open accounts	30,000.00
Policies of insurance	Uncertain
Unliquidated claims	5,462.17
Total assets	$35,507.17

The debtor's proposed Plan of Arrangement is attached hereto and marked Exhibit 'A.'

For further particulars, reference is hereby made to said petition on file in the office of the undersigned.

Dated: November 1, 1946.

HUGH L. DICKSON,
Referee in Bankruptcy."

At the meeting of December 19, 1946, no plan of arrangement was submitted as to any of the four corporations. Another hearing was held on January 30, 1947, without any further notice to Trans-Pacific Corporation or its creditors or other persons interested, and another meeting was held on February 27, 1947, without any further notice being sent out to Trans-Pacific Corporation, the debtor, creditors or other persons interested

in Neubart Stamping and Manufacturing Company, Communications Equipment Corporation, the Columbia Stamping and Manufacturing Corporation.

At the meeting on February 27, 1947, petitioners demanded in writing that their petition be dismissed [R. 152], and demanding, in the event that the motion for dismissal was denied, a trial by jury be allowed to determine the status of the petitioners. At first the referee stated that if expenses were paid he would grant the motion. Then on objections of a couple of bankruptcy attorneys but without taking any testimony, he denied the motion and summarily adjudicated the petitioners bankrupt, and arbitrarily transferred all of the properties of the corporations into the bankruptcy estate to be disposed of as bankrupt property.

No notice was sent out by the referee to the creditors or others, pursuant to the requirements of the Bankruptcy Act, that the petitioners, having proceeded voluntarily, requested a dismissal of the proceedings, and no hearing within the meaning of that word was held.

Questions Presented by This Petition.

(1) Whether the statutory notices required by the Bankruptcy Act have been complied with where petitioners filed under section 322 of the Bankruptcy Act, and no other notices are sent out except the notice to the creditors of one corporation, where there are actually four corporations, and that notice combined a notice for a meeting of the creditors together with a notice that adjudication may take place a month later.

(2) Whether a notice is required not only to the creditors, but also to the debtor and other persons interested.

(3) Whether a separate and distinct notice is required to call a meeting for proceedings under Chapter XI, section 322, and another notice in the event that the meeting to confirm the arrangement and the hearing on the confirmation and objections thereto has not succeeded.

(4) Whether, if the petition be construed as a voluntary petition in bankruptcy, the debtor has a right to ask for a dismissal of the proceedings, and whether thereafter it becomes the mandatory duty of the referee to send out notices for a hearing regarding the motion to dismiss and postpone the proceedings to permit a hearing on such notice, or whether the referee in bankruptcy can arbitrarily deny the motion to dismiss and thereafter summarily adjudicate the petitioner corporations bankrupt.

(5) Whether the referee in this case acted arbitrarily and capriciously.

(6) Whether the act of the corporations in opposing adjudication constitutes the corporations as involuntary bankrupts and entitles them to a jury trial on their status as to whether or not they are actually in bankruptcy.

(7) Whether in this status one is entitled to trial by jury under the Seventh Amendment to the Constitution of the United States.

(8) Whether the referee acted arbitrarily and capriciously in transferring all of the properties into the bankrupt estate without any hearing being offered to any of the creditors or other persons interested, and only upon the statements of a couple of attorneys interested in the outcome of the estate.

Reasons for Allowing the Writ.

I.

The petitioners raise fundamental questions of importance regarding the statutory duty of the referee in giving proper notices and proper hearing on notice thereafter in bankruptcy proceedings.

II.

The District and Circuit Courts erred in their construction of the status of corporations which cannot meet their tax obligations to the Government and in holding that they may be summarily adjudicated bankrupt without a trial on the issues of that fact.

III.

The question of proper procedure under Chapter XI of the Bankruptcy Act is involved in the steps taken in this case which have not been decided by this court.

IV.

The case also raises fundamental questions of importance upon the construction of the right and power of the referee in bankruptcy, which have not heretofore been decided, but should be decided by this Honorable Court.

Wherefore, for each of the reasons set forth herein petitioners respectfully pray that this Honorable Court grant a writ of certiorari directed to the United States Circuit Court of Appeals for the Ninth Circuit, to review the proceedings had herein and to reverse the judgment and order, and for all other proper relief.

Respectfully submitted,

MORRIS LAVINE,
Attorney for Petitioners.

IN THE

Supreme Court of the United States

October Term, 1947.

No. .....

TRANS-PACIFIC CORPORATION, a Corporation, NEUBART STAMPING AND MANUFACTURING COMPANY, a Corporation, COMMUNICATIONS EQUIPMENT CORPORATION, a Corporation, and COLUMBIA STAMPING AND MANUFACING CORPORATION, a Corporation,

Petitioners,

vs.

GEORGE T. GOGGIN, Trustee in Bankruptcy.

BRIEF IN SUPPORT OF PETITION.

The petitioners adopt the Statement on Jurisdiction and all of the statutory provisions set out in the petition itself, together with the Statement of Facts therein contained.

ARGUMENT.

I.

There Was Noncompliance With the Statutory Requirement Regarding Notice in This Case.

Chapter XI provides that all the provisions of the Bankruptcy Act shall apply to Chapter XI unless they are otherwise in conflict. (Sec. 302 of the Bankruptcy Act.)

Section 58, Title 11, Chap. 6, Sec. 94, U. S. C. A., provides that creditors shall have at least ten days' notice by mail to their respective addresses as they appear in the list of creditors of the bankrupt, or as afterwards filed with the papers in the case by the creditors. Subdivision c requires all notices shall be given by the referee unless otherwise ordered by the judge. The duty of the referee to give notice to creditors and all other parties in interest is provided by section 39a of the Bankruptcy Act. The only notice sent out in this case was the notice appearing on page 169 of the record:

> "In the District Court of the United States, Southern District of California, Central Division. In Bankruptcy No. 44,604-BH.
>
> In the Matter of Trans-Pacific Corporation, a corporation, Debtor.
>
> NOTICE OF MEETING OF CREDITORS IN PROCEEDINGS UNDER CHAPTER XI, SECTION 322 OF THE BANKRUPTCY ACT; OF TIME FOR FILING APPLICATION TO CONFIRM ARRANGEMENT, AND HEARING ON CONFIRMATION AND OBJECTIONS THERETO.
>
> To the Creditors of Trans-Pacific Corporation, a corporation, Debtor, of 1026 Pacific Mutual Building, 523 West 6th Street, Los Angeles, California, and District aforesaid:"

There was no notice shown to have been sent out to the creditors of Neubart Stamping and Manufacturing Company, a Corporation, Communications Equipment Corporation, a Corporation, and Columbia Stamping and Manufacturing Corporation, a Corporation. The notice was only addressed to the one corporation.

Section 335 of the Bankruptcy Act requires that this notice be accompanied with a copy of the proposed ar-

rangement, a summary of the liabilities and of the appraisal or assets, as shown by the schedules.

This notice had to be sent to each corporation and its creditors and persons interested. This was not done.

It is our view that this notice did not contemplate containing a notice that, if the meeting of creditors and other persons interested was unsuccessful, the referee could then dismiss or make an order of adjudication of the corporations as bankrupts; otherwise, there would be no need to provide section 376(2) of the Bankruptcy Act.

The form shown in the form book does not contain the double notice to the creditors as set out at page 169 of the record (see Form 49).

Section 376(2) provides for a notice to be in compliance therewith of at least ten days in advance for the purpose of considering either a dismissal or an adjudication.

While there are no cases directly in point on this subject, the nearest approach is *In re H. Krieger & Co.*, 40 Fed. Supp. 340, 342, wherein the court on rehearing required that a notice of such rehearing should be given under section 376(2). Thus, it would be implicit in the Act as well as that decision that before a further proceeding could be had after the first notice to creditors in an attempt to adopt a plan or confirmation of arrangement, that a second notice should be given specifically as provided by section 376(2). No such notice was given in this case and, therefore, the statutory requirements were not complied with.

Section 376(2) provides not only that the debtor be given notice, but also the creditors and all other parties in interest that such a hearing is to be had, and for that purpose fixing a specific date. This was not done.

The only notice given in the case at bar was a notice of meeting of creditors in proceedings under Chapter 11, section 322, of the Bankruptcy Act, ofttime for filing application to confirm arrangement, and hearing on confirmation and objections thereto. The referee's certificate does not state that the notice was ever sent to the debtors, nor does it show any compliance as a matter of fact with all the provisions of section 376(2).

It must be a fair import and intent in examining Chapter 11, that there was no intent or purpose in the chapter in requiring or providing two different sections for notice, if the first single notice sent out would be sufficient. Therefore, section 376(2) contemplates a second notice to be given, if the plan of arrangement is going to fail and cannot be confirmed, for the referee then to notify the debtor and creditors, and other parties in interest, that such a hearing is to be had, and for that purpose fixing a date. This was not done.

Furthermore, it is the duty of the referee to give notice to creditors, the debtor and other parties in interest. Section 58 of the Bankruptcy Act provides for ten days' notice by mail.

Section 334 requires the court to promptly call a meeting of the creditors, upon at least ten days' notice by mail to the debtor, the creditors and other parties in interest.

Section 335 requires that the notice be accompanied with a copy of the proposed arrangement, a summary of the liabilities and of the appraisal or assets as shown by the schedules.

This same section provides:

> "Such notice may also name the time for the filing of the application to confirm the arrangement and

the time for the hearing of the confirmation and of such objections as may be made to the confirmation."

Section 336 goes on to state what may be done at such meeting or any adjournment thereof.

Section 335 does not allow this notice to include the notice required by section 376(2) if the arrangement is withdrawn or abandoned or not accepted by the creditors. Nor is there any mention in section 376(2) that the adjudication or dismissal may be made at any adjournment of the meeting required under sections 334 and 335.

Section 336 allows the court to do but four things at "such meeting, or at any adjournment thereof," which four things do not include the adjudication or dismissal.

Therefore, it would appear that the intent of section 376(2) by requiring notice to be given the debtor and creditors contemplated a new notice after the plan had been withdrawn or abandoned or not accepted. Here the referee attempted to give notice of all possible contingencies in one notice instead of confining himself to the matters permitted by the Act to be contained in one notice.

This notice was sent to only one corporation and its creditors.

All of these sections require notice to the *debtor, creditors and parties in interest.* There is nothing in the record showing that this notice was sent to the debtor. On page 20 of the printed transcript the referee states in his certificate on review: "On November 1, 1946, the referee mailed to all *creditors and parties in* interest a 'Notice of Meeting, etc.'" Therefore, it would appear that no notice was sent to the debtor as required by the Act.

It is also to be noted that only in case 44604-BH—the *Trans-Pacific* case—did the referee certify to the District

Court a copy of the notice. See printed transcript at page 28 in case 44604-BH "4. Copy of Notice of Meeting of Creditors." This is the notice of which certified copies are here filed. In the other cases [Tr. pp. 61, 92 and 123] only the order of adjudication and petition for review were certified up. The referee did not certify that notice had been given in the other cases.

It is to be noted that the referee corrected his certificate and set out a motion that the proceedings be dismissed, which request was made in advance of adjudication.

Now, then, if the proceedings were to be treated as a voluntary petition in bankruptcy under the provisions of the Bankruptcy Act, section 312, subdivision 2, then it became the duty of the court, where a motion was made to dismiss the proceedings, to give notice to the creditors and other parties in interest, as required by sections 39 and 58 of the Bankruptcy Act. This was never done.

Section 39 of the Act provides that the *referees* shall give notice to creditors and other parties in interest, as provided in this Act.

Section 58 provides for ten days' notice by mail to creditors of the proposed dismissal of the proceedings, in cases where notice is required by subdivision g of section 59 of the Act.

Section 59 provides that a voluntary or involuntary petition shall not be dismissed upon the application of the petitioner or petitioners, or for want of prosecution, or by consent of the parties, until after notice to the creditors as provided in section 58 of the Act, and the court shall

delay the hearing thereon for a reasonable time to allow all creditors and parties in interest an opportunity to be heard.

Section 312(2) provides that where a petition is filed under section 322 the jurisdictions, powers and duties of the court shall be the same as if a voluntary petition in bankruptcy had been filed and a decree of adjudication entered at the time the petition was filed. See, also, section 341.

Therefore, the duty of the court being the same under section 322 as if a voluntary petition had been filed and with section 59g, requiring notice before a petition shall be dismissed, was it not required that notice be given of the written motion to dismiss and the hearing delayed a reasonable time to allow all creditors and parties in interest an opportunity to be heard instead of summarily denying the motion?

It is respectfully submitted that the specific requirements of the statute, section 376, require that before the court may enter an order it must do so:

(1) upon hearing;

(2) upon notice to

(a) the debtor;

(b) the creditors;

(c) such other persons as the court may direct.

While section 376, subdivision 2, does not state the type of notice or the form of notice to the creditor, the creditors and such other persons as the court may direct, since

Chapters 1 to 7, inclusive, are made a part of Chapter 11 in so far as they are not inconsistent therewith (section 302 of the Bankruptcy Act), we turn to section 58 (Title 11, Chapter 6, section 94, U. S. C.), which provides that creditors shall have at least ten days' notice by mail to their respective addresses as they appear in the list of creditors of the bankrupt, or afterwards filed with the papers in the case by creditors, and subdivision (c) requires "all notices shall be given by the referee unless otherwise ordered by the judge. Any notice required by this Act may be waived in writing by any person entitled thereto." Subdivision (d) states:

> "Notice to creditors of the first meeting shall be published at least once and may be published such number of additional times as the court may direct. The last publication shall be at least one week prior to the date fixed for the meeting. Other notices may be published as the court shall direct."

The duty of the referee to give notice to creditors and all parties in interest is provided by section 39(a)(1). While the Act does permit notice of meeting of creditors, section 376, subdivision (2), only permits hearing after a specific notice to the debtor, the creditors, and such other persons as the court may direct, and does not permit a hearing at a different time or at any adjournment of that time. This contemplates a different and additional notice to the first one. Hence, the meeting of February 27, 1947, at which the orders of adjudication were made, is without notice.

The District Court erred in holding that the referee was within his jurisdiction in making the order, as it was not pursuant to and in keeping with section 376 of the Bankruptcy Act, which provides:

> "If an arrangement is withdrawn or abandoned prior to its acceptance, or is not accepted at the meeting of creditors or within such further time as the court may fix, or if the money or other consideration required to be deposited is not deposited or the application for confirmation is not filed within the time fixed by the court, or if confirmation of the arrangement is refused the court shall
>
> * * * * * * * *
>
> (2) where the petition was filed under section 322 of this Act, enter an order, upon hearing *after notice to the debtor, the creditors, and such other persons as the court may direct,* either adjudging the debtor a bankrupt and directing that bankruptcy be proceeded with pursuant to the provisions of this Act or dismissing the proceeding under this chapter, whichever in the opinion of the court may be in the interest of the creditors."

This court should grant certiorari to determine the important question of notice and the time and form it should be given.

II.

If the Petitioner Corporations Were to Be Treated as Voluntary Petitioners in Bankruptcy in the Event Their Plan of Arrangement Failed, Then Upon Their Motion to Dismiss It Was Mandatory Upon the Referee in Bankruptcy to Delay the Hearing for a Reasonable Time and Have Notices Sent Out.

The motion of the debtor to be dismissed was a motion it could make under the authority of section 302 of chapter 11, which incorporates the provisions of chapters 1 to 7, and it was its right to move the dismissal of a voluntary proceeding under section 59 of the Bankruptcy Act (Title 11, chapter 6, section 95). Subdivision g of this section is mandatory that, upon a motion to dismiss being made, notice shall be sent to the creditors of the pendency of such application and "shall delay the hearing thereon for a reasonable time to allow all creditors and parties in interest an opportunity to be heard." Neither was the notice sent out, nor was there a delay for a reasonable time pursuant to the requirements of the statute treating the petitioners as voluntary bankrupts, but instead the court summarily adjudicated the debtor and granted no hearing on its application to be dismissed from the chapter proceedings.

III.

The Referee Acted Arbitrarily and Capriciously in Denying the Motion to Dismiss Without a Delay, in Compliance With the Statute. If the Petitioners, After Discovering That the Chapter XI Proceedings Were Not to Their Best Interests, Thereafter Moved to Dismiss the Proceedings, They Were Entitled to Have This Done, as There Are Many People Who Owe Money to the Government, but Who Are Still Not Bankrupt.

When petitioners moved to dismiss the proceedings no testimony was taken. The referee at first said he would dismiss if the expenses were paid, then when objections were made by Mr. Goggin, the attorney for the trustee of the properties, and a couple of attorneys spoke up with objections, the referee, with nothing more, adjudicated the corporations bankrupt, over a written demand for trial by jury and objections that the taking of petitioners' properties was in violation of due process of law guaranteed by the Fifth Amendment to the Constitution of the United States [R. 152-157].

IV.

If Petitioners Were Forced Into Bankruptcy They Were "Involuntary" and as Such Were Entitled to a Jury Trial and Hearing on Their "Status" as to Whether They Were Bankrupt.

It is respectfully submitted that when the attorneys for a couple of creditors spoke up with objections, if their objections could be considered at all, it placed petitioners in the class of being forced involuntarily into bankruptcy and they were entitled to have their status as bankrupts adjudicated by trial by jury. This was a question of fact, because people who owe money to the Government are not necessarily in the status of a bankrupt. The District Court denied that such a right existed and the Circuit Court affirmed on the basis of the District Court's opinion.

It is respectfully submitted that the order of the referee took private property without due process of law, in violation of the Fifth Amendment to the Constitution, and that the referee's action was arbitrary and capricious, and in violation of due process of law guaranteed by the Fifth Amendment to the Constitution of the United States.

It is further contended that the statute, section 376(2), if construed as applied in this case, is unconstitutional as in violation of the Fifth Amendment to the Constitution.

The proceedings had were such that the Referee was willing to dismiss the proceedings until certain attorneys for certain creditors objected and sought to have the petitioner adjudicated a bankrupt. Their conduct was such, under the state of the record here, as to be comparable to

an involuntary petition in bankruptcy. They could have petitioned the court, had they so desired, to adjudicate the petitioner a "bankrupt under an involuntary petition" and if they had done so, he would have been entitled, without question, to a jury trial, Section 19(a) of the Bankruptcy Act.

Title 11, Chapter 4, Section 42, Section 19(c) of the Bankruptcy Act provides as follows:

> "The right to submit to a jury matters in controversy or an alleged offense under this Act shall be determined and enjoyed, except as provided by this Act, according to the laws of the United States now in force or such as may be hereafter enacted in relation to trials by jury,"

Under the procedure had, it was therefore the right of the petitioner to have the controversy as to whether his status was a bankrupt determined by a jury and not summarily and arbitrarily by the Referee because Mr. Seymour, the attorney for Donovan and Schuenke who had been the appellants' tax auditors, and Mr. Weller, another attorney had asked the court to adjudicate the petition in bankruptcy.

The right to a jury trial in a bankruptcy proceeding has long been preserved by Congress and the Supreme Court.

In *Elliott & Co. v. Toeppner*, 187 U. S. 327, 47 L. Ed. 200, the court said:

> "The district courts as courts of bankruptcy are invested with 'such jurisdiction at law and in equity as

will enable them to exercise original jurisdiction in bankruptcy proceedings' in the particulars named, it being provided that the specification of certain powers should not deprive them of powers they would possess but for the enumeration. The proceedings in administration of the estate are equitable in their nature, but the bankruptcy courts act under specific statutory authority, and when on an issue of fact as to the existence of ground for adjudication a jury trial is demanded, it is demanded as of right, and the trial is a trial according to the course of the common law. This being so, judgments therein rendered are revisable only on writ of error. *Knickerbocker Ins. Co. v. Comstock,* 16 Wall. 258, 21 L. ed. 493; *Parsons v. Bedford,* 3 Pet. 448, 7 L. ed. 737; *Duncan v. Landis,* 45 C. C. A. 666, 106 Fed. 839.

By Sec. 41 of the bankruptcy act of 1867 it was provided that the courts should, if the debtor so demanded in writing, order a trial by jury to ascertain the fact of the alleged bankruptcy, and in *Knickerbocker Ins. Co. v. Comstock,* Mr. Justice Clifford, speaking for the court, said: 'Such a provision is certainly entitled to a reasonable construction, and it seems plain, when it is read in the light of the principles of the Constitution and of analogous enactments, and when tested by the general rules of law applicable in controversies involving the right of trial by jury, that the process, pleadings, and proceedings must be regarded as governed and controlled by the rules and regulations prescribed in the trial of civil

actions at common law.' The 1st paragraph of Sec. 2 of the act was referred to, which provided 'that the several circuit courts of the United States, within and for the districts where the proceedings in bankruptcy shall be pending, shall have a general superintendence and jurisdiction of all cases and questions arising under this act; and, except when special provision is otherwise made, may, upon bill, petition, or other proper process, of any party aggrieved, hear and determine the case in a court of equity' (14 Stat. at L. 517, Chap. 176); and it was held that the case was excluded from the general superintendence and jurisdiction of the circuit court by the exception; and that, even admitting that decrees in equity rendered in the district court might be revised in a summary way if Congress should so provide, it was 'clear that judgments in actions at law rendered in that court, if founded upon the verdict of a jury, can never be revised in the circuit court in that way, as the Constitution provides that 'no fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rule of the common law.' "

And, in *Knickerbocker Ins. Co. v. Comstock,* 83 U. S. 258, 21 L. Ed. 498, the court said:

"Power and jurisdiction in all matters and proceedings in bankruptcy are conferred upon the district courts, but the 41st section of the bankrupt act expressly provides that the court shall, if the debtor, on the return day, or day of hearing, 'so demand in writ-

ing,' order a trial by jury at the first term of the court at which a jury shall be in attendance, to ascertain the alleged fact of such alleged bankruptcy. Regulations are also enacted as to the matters open to inquiry and the course of the trial, as follows: that if, upon such hearing or trial the debtor proves to the satisfaction of the court, 'when the hearing is summary, or of the jury, if one is demanded,' that the facts are set forth in the petition are not true, or that he, the debtor, has paid and satisfied all liens upon his property; in case the existence of such liens is the sole ground of the petition, the proceedings shall be dismissed and the respondent shall recover costs. 14 Stat. at L. 537."

The arbitrary and summary adjudication of the petitioner corporations as "bankrupts" and the removal of the property which belonged to him and to the corporations into the custody of the trustee in bankruptcy took the appellants' property without due process of law. There is no arbitrary power on the part of the court to take a corporation's property and declare him a bankrupt.

Subsection C of Section 19 says:

"(c) The right to submit matters in controversy, or an alleged offense under the provisions of this title, to a jury shall be determined and enjoyed, except as provided in this title, according to the United States laws in force in relation to trials by jury. (July 1, 1898, c. 541, sec. 19, 30 Stat. 551; Mar. 3, 1911, c. 231, sec. 289, 36 Stat. 1167.)"

V.

The Petitioners' Status Was Involved. This Is a Question of Fact as to Whether They Were in the Status of a Bankrupt. This Entitled Them to a Trial by Jury.

The respondent is entitled to a jury upon everything which affects his solvency. (*Buffalo Milling Co. v. Lewisburg Dairy Co.*, 139 Fed. 379.)

The right of the debtor to a jury trial on the question of his solvency is absolute. The court cannot withhold the right at its discretion. (*Elliott v. Toeppner*, 187 U. S. 327, 47 L. Ed. 200.)

Under this section the right is not extended to intervening creditors. (*In re Book W. & Co.*, 232 Fed. 483.)

When a jury trial is demanded the trial is according to the common law. (*Moore v. Yampa Mercantile Co.*, 287 Fed. 629, and other cases so hold.)

Since the proceeding under Section 377 does not confess bankruptcy and the court must decide that question as a matter of fact. The question of the respondent's insolvency is in a sense outside the bankruptcy proceeding proper. It must be decided before the court has jurisdiction to proceed.

Collier on Bankruptcy (p. 427) expresses the opinion that "(c)" of Section 42 "clearly refers to controversies which are not strictly 'proceedings in bankruptcy' and give a right to jury trial."

Under the *Continental etc. Co.* decision, it is clear that the determination to be made as to the debtor's solvency is contestible, when for any reason the proposed plan of reorganization is not confirmed.

In the case of a person who petitions to compose his debts, he does not thereby admit insolvency or bankruptcy and he is entitled to receive a trial on that issue of fact the same as if he had been proceeded against on an involuntary petition. Indeed, under the factual situation of this case, it was not the debtor's desire to be declared a bankrupt but some of the creditor's desire to do so.

Amendment VII of the Federal Constitution reads:

> "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law." (Ohlinger's Federal Practice 1, p. 112.)

It is noteworthy that this amendment stresses the preservation of the right of trial by jury and fails to mention suits in equity or the rules of courts of equity.

It has been said that in applying the Federal Rules of Procedure which distinguish between suits at common law and suits in equity "the true basis of separate procedure at law and in equity has been recognized by many judges" as "the right of trial by jury." (*Bennett v. Butterworth,* 52 U. S. (11 How.) 669, 674, 1850.)

It is well established that the right to a trial by jury as guaranteed by the Seventh Amendment means a trial in the mode and according to the settled rules of the common law, including all of the essential elements recognized in this country and England when the Constitution was adopted. (*Patton v. U. S.*, 281 U. S. 276, 74 L. ed. 854, 858; *Dimick v. Scheidt*, 293 U. S. 474, 476.)

To determine these new and important issues petitioners pray that certiorari be granted.

reports of the completion thereof; and (10 safely keep,

Respectfully submitted,

MORRIS LAVINE,
Attorney for Petitioners.

APPENDIX.

SECTION THIRTY-NINE OF THE BANKRUPTCY ACT.

a. Referees shall (1) give notice to creditors and other parties in interest, as provided in this Act; (2) prepare and file the schedules of property and lists of creditors required to be filed by the bankrupts or cause the same to be done when the bankrupts fail, refuse, or neglect to do so; (3) examine all schedules of property, lists of creditors, and statements of affairs, filed as provided under this Act, and cause such as are incomplete and defective to be amended; (4) furnish or cause to be furnished such information concerning proceedings before them as may be requested by parties in interest; (5) declare dividends and cause to be prepared dividend sheets showing the dividends declared and to whom payable; (6) transmit to the clerks such papers as may be on file before them whenever the same are needed in any proceedings in courts and secure the return of such papers after they have been used, or, if it be impractical to transmit the original papers, transmit certified copies thereof by mail; (7) upon application of any party in interest, preserve the evidence taken, or the substance thereof as agreed upon by the parties before them when a stenographer is not in attendance; (8) prepare promptly and transmit to the clerks certificates on petitions for review of orders made by them, together with a statement of the questions presented, the findings and orders thereon, the petition for review, a transcript of the evidence or a summary thereof, and all exhibits; (9) transmit forthwith to the clerks all bonds filed with and approved by them, the originals of all orders made by them granting adjudications or dismissing the petitions as provided in this Act, and certified copies of all orders made and entered by

them, granting, denying, or revoking discharges, or confirming or refusing to confirm arrangements or plans or setting aside the confirmation of arrangements or wage-earner plans and reinstating the proceedings or cases, and reports of the completion thereof; and (10) safely keep, perfect, and transmit to the clerks, when the cases are concluded, the records herein required to be kept by them.

b. Referees shall not (1) act in cases in which they are directly or indirectly interested; (2) purchase, directly or indirectly, any property of an estate in any proceeding under this Act. Active full-time referees shall not exercise the profession or employment of counsel or attorney, or be engaged in the practice of law. Active part-time referees, and referees receiving benefits under paragraph (1) of subdivision d of Section 40 of this Act, shall not practice as counsel or attorney in any proceeding under this Act.

c. A person aggrieved by an order of a referee may, within ten days after the entry thereof or within such extended time as the court may for cause shown allow, file with the referee a petition for review of such order by a judge and serve a copy of such petition upon the adverse parties who were represented at the hearing. Such petition shall set forth the order complained of and the alleged errors in respect thereto. Upon application of any party in interest, the execution or enforcement of the order complained of may be suspended by the court upon such terms as will protect the rights of all parties in interest.

SECTION FIFTY-EIGHT OF THE BANKRUPTCY ACT.

Notices. a. Creditors shall have at least ten days' notice by mail, to their respective addresses as they appear

in the list of creditors of the bankrupt or as afterward filed with the papers in the case by the creditors, of (1) all examinations of the bankrupt, if the court so directs; (2) all hearings upon applications for the confirmation of arrangements and wage-earner plans; (3) all meetings of creditors; (4) all proposed sales of property: *Provided,* That the court may, upon cause shown, shorten such time or order an immediate sale without notice; (5) the filing of all accounts of the receiver and trustee, for which confirmation is asked, and the time when they will be examined and passed upon; (6) the proposed compromise of any controversy in which the amount claimed by either party in money or value exceeds $1,000; (7) the proposed dismissal of the proceedings, in cases where notice is required by subdivision g of section 59 of this Act; and (8) all applications by receivers, ancillary receivers, marshals, trustees, and attorneys for compensation from the estate for services rendered, specifying the amount and by whom made: *Provided,* That where a creditors' committee has been appointed pursuant to this Act, the notice required by clauses (1), (4) and (6) of this subdivision shall be sent only to such committee and to the creditors who have filed with the court a demand that all notices under this subdivision be mailed to them.

b. The court shall give at least thirty days' notice by mail of the last day fixed by its order for the filing of objections to a bankrupt's discharge (1) to the creditors, in the manner prescribed in subdivision a of this section (2) to the trustee and his attorney, at their respective addresses as filed by them with the court; and (3) to the United States attorney of the judicial district wherein the proceeding is pending. The court shall also give at least thirty days' notice by mail of the time and place of a

hearing upon objections to a bankrupt's discharge (1) to the bankrupt, at his last known address as appears in his petition, schedules, list of creditors, or statement of affairs, or, if no address so appears, to his last-known address as furnished by the trustee or other party after inquiry; (2) to the bankrupt's attorney, if any, at his address as filed by him with the court; and (3) to the objecting parties and their attorneys, at their respective addresses as filed by them with the court.

c. All notices shall be given by the referee unless otherwise ordered by the judge. Any notice required by the Act may be waived in writing by any person entitled thereto.

d. Notice to creditors of the first meeting shall be published at least once and may be published such number of additional times as the court may direct; the last publication shall be at least one week prior to the date fixed for the meeting. Other notices may be published as the court shall direct.

e. The clerk shall mail to the Commissioner of Internal Revenue a certified copy of every order of adjudication forthwith upon the entry thereof. The court shall, in every case, mail or cause to be mailed a copy of the notice of the first meeting of creditors to the Commissioner of Internal Revenue and to the collector of internal revenue for the district in which the court is located.

SECTION FIFTY-NINE OF THE BANKRUPTCY ACT OF 1938.
(United States Code, Title 11, Chap. 6, Sec. 95)

g. A voluntary or involuntary petition shall not be dismissed upon the application of the petitioner or petitioners, or for want of prosecution, or by consent of parties, until after notice to the creditors as provided in

section 58 of this Act, and to that end the court shall, upon entertaining an application for dismissal, require the bankrupt to file a list, under oath, of all his creditors, with their addresses, shall cause such notice to be sent to the creditors of the pendency of such application and shall delay the hearing thereon for a reasonable time to allow all creditors and parties in interest an opportunity to be heard. If the bankrupt shall fail to file such list within the time fixed by the court, such list may be filed by the petitioning creditors according to the best of their knowledge, information and belief: Provided, however, That in the case of a dismissal for failure to pay the costs of the bankruptcy proceedings, such notice of dismissal shall not be required.

SECTION 312 OF THE BANKRUPTCY ACT.

Where not inconsistent with the provisions of this chapter, the jurisdiction, powers, and duties of the court shall be the same— . . .

(2) where a petition is filed under section 322 of this Act, as if a voluntary petition for adjudication in bankruptcy had been filed and a decree of adjudication had been entered at the time the petition under this chapter was filed.

SECTION 322 OF THE BANKRUPTCY ACT.

If no bankruptcy proceeding is pending, a debtor may file an original petition under this chapter with the court which would have jurisdiction of a petition for his adjudication.

SECTION 334 OF THE BANKRUPTCY ACT.

The court shall promptly call a meeting of creditors, upon at least ten days' notice by mail to the debtor, the creditors, and other parties in interest.

SECTION 335 OF THE BANKRUPTCY ACT.

The notice of such meeting of creditors shall be accompanied by a copy of the proposed arrangement, a summary of the liabilities as shown by the schedules and a summary of the appraisal, if one has been made, or, if not made, a summary of the assets as shown by the schedules. Such notice may also name the time for the filing of the application to confirm the arrangement and the time for the hearing of the confirmation and of such objections as may be made to the confirmation.

SECTION 336 OF THE BANKRUPTCY ACT.

At such meeting, or at any adjournment thereof, the judge or referee—

(1) shall preside;

(2) may receive proofs of claim and allow or disallow them;

(3) shall examine the debtor or cause him to be examined and hear witnesses on any matter relevant to the proceeding; and

(4) shall receive and determine the written acceptances of creditors on the proposed arrangement, which acceptances may be obtained by the debtor before or after the filing of a petition under this chapter.

SECTION 376 OF THE BANKRUPTCY ACT.

If an arrangement is withdrawn or abandoned prior to its acceptance, or is not accepted at the meeting of creditors, or within such further time as the court may fix, or if the money or other consideration required to be deposited is not deposited or the application for confirmation is not filed within the time fixed by the court, or if confirmation of the arrangement is refused, the court shall— . . .

(2) where the petition was filed under section 322 of this Act, enter an order, upon hearing after notice to the debtor, the creditors, and such other persons as the court may direct, either adjudging the debtor a bankrupt and directing that bankruptcy be proceeded with pursuant to the provisions of this Act or dismissing the proceeding under this chapter, whichever in the opinion of the court may be in the interest of the creditors.

TITLE 11, SEC. 42, U. S. A.

Jury Trials. a. A person against whom an involuntary petition has been filed shall be entitled to have a trial by jury in respect to the question of his insolvency, except as herein otherwise provided, and of any act of bankruptcy alleged in such petition to have been committed, upon filing a written application therefor at or before the time within which an answer may be filed. If such application is not filed within such time, a trial by jury shall be deemed to have been waived.

b. If a jury is not in attendance upon the court, one may be specially summoned for the trial or the case may be postponed.

c. The right to submit to a jury matters in controversy or an alleged offense under this title shall be determined and enjoyed, except as provided by this title, according to the laws of the United States now in force or such as may be hereinafter enacted in relation to trials by jury.

AMENDMENT 7, CONSTITUTION OF THE UNITED STATES.

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.